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INTRODUCTION

The Federal Rules of Civil Procedure were promulgated in 1938 to provide the “just, speedy, and inexpensive determination” of all civil actions.¹ The underlying theme of the Federal Rules is that meritorious litigants should have their day in court.² To that end, the

¹ FED. R. CIV. P. 1.

² Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) (“As has been recognized repeatedly by the Supreme Court, the distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation.”).

Federal Rules eliminated procedural pitfalls, including highly technical forms of action inherited from common law, that rewarded mastery of pleading techniques over the substantive merits of claims. The Federal Rules also introduced a simplified pleading system, commonly denominated as “notice pleading,”³ thereby easing the heavy burden imposed on the parties. The factual details of the case could then be developed through pretrial discovery. The aim was to facilitate, not to discourage, trial on the merits.

Unfortunately, the stated goal of the Federal Rules to provide the “just, speedy, and inexpensive” determination of all civil disputes has grown elusive. The world has changed significantly in the seventy-five years since the Federal Rules were initially promulgated. Litigation in federal courts has become very expensive and unduly lengthy. The cost, length, and complexity of federal cases has made it riskier to proceed in federal court. More importantly, many, including Justices on the Supreme Court, question the ability of federal judges to reach good outcomes.⁴

The federal civil justice system is now at the crossroads. Many putative litigants have chosen to opt out of the courts in favor of some form of alternative dispute resolution (ADR), which they perceive as cheaper, faster, more private, and less risky than the court system. Others opt for foreign forums to avoid the perceived harshness of some American laws. Even those matters that are filed in the courts rarely go to trial—they are either settled or dismissed on motion. While settlement of disputes is normally viewed as desirable, settlements that are prompted solely by economic concerns totally divorced from the merits of any claims are troublesome. The judicial response to the problems of cost and complexity, typified by *Bell Atlantic Corp. v. Twombly* and its progeny, is to dismiss poorly

³ See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 68, at 471 (7th ed. 2011) [hereinafter WRIGHT & KANE]; Charles E. Clark, *The Federal Rules of Civil Procedure: 1938–1958*, 58 COLUM. L. REV. 435, 450–51 (1958). Not surprisingly, these concerns were not unfounded. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007) (rejecting the notion “that the Federal Rules somehow dispensed with the pleading of facts altogether”).

⁴ See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) (acknowledging that failure to comply with technology sharing requirements under Telecommunications Act “can be difficult” for a court to evaluate, and identifying exclusionary conduct would prove a “daunting task” for “generalist” antitrust courts (citation omitted) (internal quotation marks omitted)).

pleaded cases at the outset of the litigation, irrespective of substantive merit.

The unintended consequence of these phenomena—the exodus from the court system in favor of ADR, settlements, and *Twombly*—is that civil trials are fast becoming obsolete.⁵ That is most undesirable. The availability of a judicial forum to decide claims on the merits remains important because it assists in the development of a rational legal system that is predictable and accessible to the public and that produces outcomes that are fair to the litigants. Yet, if the federal courts stand pat and do not take steps to control the costs of litigation, the continued slide to irrelevance is inevitable.

Fortunately, the court system can reverse this decline. The Federal Rules of Civil Procedure provide all the necessary tools to control costs, minimize delays, and limit the length and complexity of trials. Courts simply need to implement these rules in the day-to-day management of litigation. In addition, by incorporating technological advances, courts can reduce costs, simplify trials, and achieve better outcomes. The judicial system is clearly up to these tasks. Now is the time to act.

I

BACKGROUND

A. The Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure represented a marked departure from the pleading rules developed at common law and built on the improvements introduced by the Field Code and similar reform statutes.⁶ First, the Federal Rules created uniform rules of practice and procedure throughout the federal civil justice system. Prior to the Federal Rules, federal practice and procedure was governed by the law of the state in which the federal court was sitting.⁷ The adoption

⁵ See Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 747 (2010) (“[T]rials are an increasingly small part of the daily routine of the federal trial courts. Most district courts now try very few civil or criminal cases . . .”).

⁶ See Miller, *supra* note 2, at 288–89 (“Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and American procedural systems—that is, the common law forms of action and then the codes—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality.”).

⁷ In a series of laws, known as Conformity Acts, Congress directed the federal courts to follow state rules of pleading and practice. See 4 CHARLES ALAN WRIGHT & ARTHUR R.

of uniform rules assured that results in like cases litigated in different federal venues would not diverge solely because of differences in local procedural rules.

Second, the Federal Rules modernized pleading and practice by (1) eliminating the formal distinctions between law and equity; (2) reducing the number of pleadings to three, thus doing away with the endless paper exchange that characterized common law pleadings; and (3) abolishing technical forms of pleading.⁸ In addition, the Federal Rules introduced a simplified pleading system.⁹ A pleading no longer would have to fit within the confines of a cause of action cognizable at common law.¹⁰ Nor would the complaint have to contain a detailed factual recitation of all the elements necessary to make out a cause of action.¹¹

Rather, the complaint would simply have to provide sufficient factual information to put the defendant on notice of the claim and the grounds upon which it rests.¹² This simplified pleading system, known universally as “notice pleading,” is the cornerstone of the Federal Rules.¹³ It was adopted because the drafters concluded that historically, the complainant had been asked to do too much.¹⁴ It was

MILLER ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1002 (3d ed. 2004) [hereinafter WRIGHT & MILLER].

⁸ See Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 105 (2011) [hereinafter Cavanagh, *Making Sense of Twombly*]; see also FED. R. CIV. P. 2, 7(a), 8(a). Rule 7(a) allows only for complaints, answers, and replies to answers. FED. R. CIV. P. 7(a).

⁹ Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 105; see also FED. R. CIV. P. 8(a).

¹⁰ Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 105.

¹¹ *Id.*; see also FED. R. CIV. P. 8(a).

¹² See FED. R. CIV. P. 8(a); see also Miller, *supra* note 2, at 289 (“As exemplified by several of the skeletal Official Forms attached to the Rules, the pleader merely had to say that she felt aggrieved and state what was desired—something metaphorically analogous to Oliver Twist’s simple request, ‘Please, sir . . . I want more [gruel].’” (alteration in original)).

¹³ Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 L. & CONTEMP. PROBS. 144, 154 (1948); Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 106.

¹⁴ See Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 277 (1942).

Therefore, it may be concluded that this tendency to seek admissions by detailed pleadings is at best wasteful, inefficient, and time-consuming, at most productive of confusion as to the real merits of the cause and even of actual denial of justice. The continuous experience from common-law pleading down through the reversions to pleading formalities recurring under code pleading indicates the necessity of having clearly in mind the limited, but important, purposes of pleading and how they cannot be pressed wisely beyond such purposes. It demonstrates, in the writer’s judgment, the necessity of procedural rules which

simply unrealistic to expect a complaint to contain a detailed factual recitation of any claim at the outset of the case, especially when at least some information was within the exclusive control of the defendant. The notice function, on the other hand, is a role for which the pleadings are well-suited. The factual details underlying the claim could be fleshed out in discovery.¹⁵

Discovery was the “Cinderella of the changes” under the Federal Rules.¹⁶ The mandatory exchange of information prior to trial is designed to prevent unfair surprise and to limit the number of issues tried by encouraging admissions of fact and elimination of claims and defenses for which there is no factual support.¹⁷ It also facilitates settlement of claims. Discovery fundamentally altered the way in which litigants approached the trial of a lawsuit. Discovery equalizes access to proof and thereby levels the litigation playing field.¹⁸ Modern civil trials are nothing more than an orderly presentation of what has been learned in discovery. Trial in the sunshine has replaced trial by ambush.¹⁹

Third, the guiding principle of the Federal Rules is that litigants with meritorious claims ought to have their day in court.²⁰ Looking back from a twenty-first century perspective, this goal seems rather modest. Yet, it was, and remains, very significant. At common law, the goal was to avoid trial.²¹ It is thus not surprising that common law procedures were complicated and difficult to navigate, and that one misstep could lead to dismissal with prejudice.²² Similarly, strict

enforce the mandate of simplicity and directness and which are made real and compelling by illustrative forms showing what this simplicity means in actual experience. And it demonstrates further the need of a continuing rules committee to watch lest through habit and practice form comes to dominate substance.

Id.

¹⁵ See Miller, *supra* note 2, at 289.

¹⁶ WRIGHT & KANE, *supra* note 3, § 81, at 577.

¹⁷ See *id.* § 81, at 577–78.

¹⁸ See Miller, *supra* note 2, at 289.

¹⁹ See Raoul Berger & Abe Karsh, *Government Immunity from Discovery*, 59 YALE L.J. 1451, 1451 (1950).

²⁰ See Miller, *supra* note 2, at 286; see also Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989) [hereinafter Weinstein, *After Fifty Years*] (“The drafters’ commitment was to a civil practice in which all parties would have ready access to the courts and to relevant information, a practice in which the merits would be reached promptly and decided fairly. Every claimant would get a meaningful day in court.”).

²¹ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 105, 119.

²² See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986).

pleading requirements often made it difficult to get past motions to dismiss.²³ The Federal Rules eliminated the land mines from the litigation landscape so as to facilitate trial.²⁴ The Federal Rules focus on the substance of the claim or defense and not on the manner in which it is pleaded.²⁵ If the claim is meritorious, then the claim should go to trial.²⁶

In sum, the drafters of the Federal Rules designed a system in which (1) all parties would have access to the courts, (2) parties would have access to information relevant to their claims and defenses through pretrial discovery,²⁷ (3) the courts would promptly and fairly decide cases, and (4) parties would have their day in court.²⁸ The federal courthouse was the “beacon” which would guide the aggrieved to a just result.²⁹ However, fewer and fewer civil cases are tried in federal courts.³⁰ Recent Supreme Court cases have encouraged disposition prior to trial;³¹ and, with that reality in mind, litigants may be more willing to settle their disputes. In short, the reality of federal civil litigation today differs significantly from the vision of the drafters of the Federal Rules.

B. What Went Wrong?

For their first decade or so, the Federal Rules worked well.³² Despite some guerilla opposition,³³ federal courts and litigants largely

²³ See *id.* (“[T]he defendant could take comfort in the prospect that the plaintiff could ultimately lose because his lawyer bungled the pleading war.”).

²⁴ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 105.

²⁵ See *id.*

²⁶ *Id.*

²⁷ WRIGHT & KANE, *supra* note 3, § 81, at 577.

²⁸ See Weinstein, *After Fifty Years*, *supra* note 20, at 1906.

²⁹ *Id.*

³⁰ See Higginbotham, *supra* note 5, at 747.

³¹ See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (noting that deficient claims should “be exposed at the point of minimum expenditure of time and money by the parties and the court” (citations omitted)).

³² See Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 249–50 (2010) (“Initially, lawyers seemed to be on board with the approach taken by the Federal Rules.”).

³³ See, e.g., *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 109–10 (S.D.N.Y. 1956).

If a complaint contains nothing more than general allegations that defendants have violated various provisions of the anti-trust laws combined with a prayer for relief, such a pleading, . . . becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pre-trial

accepted notice pleading.³⁴ From time to time, the Rules were amended, but the changes were incremental.³⁵ Federal litigation flourished under these Rules.³⁶ Yet, as early as 1951, the judiciary recognized the changing nature of litigation in the federal courts—specifically that federal antitrust litigation was growing more complex and expensive—and established a committee to study the implications of these changes.³⁷ Thereafter, the Judicial Conference of the United States commissioned the Handbook of Recommended Procedures for the Trial of Protracted Cases.³⁸ In the preface to the Handbook, the drafters pointed out that the growth in size and complexity of American business litigation in federal courts:

proceedings on collateral issues, most of which may have little relationship to the true issue in the case.

Id. (citations omitted) (internal quotation marks omitted).

³⁴ See Kourlis, Singer & Knowlton, *supra* note 32, at 249–50.

³⁵ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 107.

³⁶ *Id.*

³⁷ JUDICIAL CONFERENCE OF THE U.S., THE REPORT: PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951), reprinted in Leon R. Yankwich, “Short Cuts” in Long Cases, 13 F.R.D. 41, 62 (1951) [hereinafter The Prettyman Report]; see also Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 27–29 (1950); see generally Wm. Dwight Whitney, *The Trial of an Anti-Trust Case*, 5 REC. ASS’N B. CITY N.Y. 449 (1950) (discussing procedural forms that could ease expanding antitrust litigation); Milton Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 REC. ASS’N B. CITY N.Y. 59 (1951); Leon R. Yankwich, *Observations on Anti-Trust Procedures*, 10 F.R.D. 165 (1951); John T. Chadwell & Richard W. McLaren, *The Current Status of the Antitrust Laws*, U. ILL. L.F. 491 (1950). The Prettyman Report addressed problems that

arise[] when a case brought to the court involves, potentially, many issues, many defendants, hundreds of exhibits, thousands of pages of testimony, weeks or months of hearings, and hundreds of thousands of dollars. A few sample cases and the material involved are: the Hartford-Empire (glass container) case . . . , in which 3,300 exhibits were considered and 18,000 pages of record made; the Libbey-Owens-Ford (flat glass) case . . . , in which 6,000 exhibits were proposed to be offered and 900 were eventually received; the A. & P. case . . . , which involved 7,000 exhibits and 45,000 pages of testimony; the United Shoe Machinery case . . . , in which the Government offered 4,600 exhibits at one time; the Alcoa case . . . involved 15,000 pages of record; the National Lead case . . . , [involved] 1,400 exhibits and 5,000 pages of record; there were 3,700 exhibits in the Imperial Chemical Industries case . . . and 10,600 were processed in the Investment Bankers case . . . ; in the American Can Company case . . . 1,773 exhibits were offered, and in the Food and Grocery Company case . . . 1,407; Ferguson v. Ford and Dearborn . . . contains 27,000 exhibits and 70,000 pages of record.

The Prettyman Report, *supra* note 37, at 63–64.

³⁸ JUDICIAL CONFERENCE STUDY GRP. ON PROCEDURE IN PROTRACTED LITIG., HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES (1960).

Modern American business is big and complex, consequently, many of its controversies are big and complex. But procedure of the courtroom was designed in simpler times and for simpler disputes. In its established methods it is unable to cope with the tangled skeins of vast business conflicts. Such lawsuits involve hundreds—even thousands—of documents, and thousands—even tens of thousands—of pages of testimony, and weeks and months and even years of trial. The normal course is ponderous, expensive and time-consuming. But more dangerous is the burial of relevant, material nuggets of fact in dunes of the irrelevant or immaterial. Accuracy in the disposition of issues, the supreme aim of adjudication, becomes more and more difficult. So the normal processes of the courts have become more and more unsatisfactory in some types of litigation. Let it be emphasized this is not the ordinary litigation. Our subject is rare in number, the truly complicated, a few hundred amid the tens of thousands of cases on federal court calendars.³⁹

The drafters were quick to identify the sources of these difficulties:

The chief faults causing the difficulties in protracted cases were easily uncovered. They were (1) lack of central control, so that issues were cloudy, examination and cross-examination meandering and proffered material unlimited; (2) inadequate organization of personnel and material prior to the beginning of formalities, an absolute essential to any successful performance involving numbers of people or masses of materials; (3) lack of an over-all plan for proceeding; and (4) an obstinate adherence to the possible use of surprise as a tactic, a tactic obviously impossible in proceedings such as these. Time and thought have yielded suggestions for remedies.⁴⁰

Commentators, even in those early days, focused on discovery as a root cause of expense, length, and delay in big cases.⁴¹ Concerns with the Federal Rules intensified in the 1960s as the litigation landscape continued to change and federal cases grew even larger in size, scope, and complexity. For example, the federal government's criminal prosecutions in the *Electrical Equipment Cases* spawned some two thousand follow-up private, civil treble damage antitrust actions, thereby ushering in the Big Case Era in antitrust.⁴² Suddenly, multiparty, multidistrict litigation became commonplace, imposing an

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 10.

⁴¹ See Leon R. Yankwich, "Short Cuts" in *Long Cases: A Commentary on the Report Entitled Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 41, 83 (1953).

⁴² Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 211 (1976); see Tony A. Freyer, *What Was Warren Court Antitrust?*, 2009 SUP. CT. REV. 347, 359 ("following the massive electrical equipment cases, private litigation also proliferated").

enormous burden on the federal judiciary. To ease this burden, Congress created the Judicial Panel for Multidistrict Litigation, which made it possible to consolidate before one federal judge, for pretrial purposes, cases involving common claims against the same defendants.⁴³

Procedural changes also contributed to this trend. In 1966, Rule 23 of the Federal Rules of Civil Procedure was amended to liberalize procedures for class actions, making some types of cases, particularly antitrust and securities matters, more complex and much more expensive to litigate.⁴⁴ In addition, changes in substantive law, notably the enactment of stronger civil rights laws and environmental laws allowing private rights of action, helped to reshape federal dockets. Similarly, judicial endorsement of products liability theories, which made it easier for plaintiffs to recover in personal injury cases, led to an influx of torts suits. Courts also began to recognize and embrace scientific evidence, when that evidence could shed light on liability and damage issues.

Moreover, dramatic advances in technology made it both possible and efficient for litigants to create, generate, distribute, store, and retrieve mountains of data. As a result, litigants typically have access to vast troves of electronically stored information (ESI). However, the sheer volume of such data may literally bury courts and litigants in paper; and the costs of locating, retrieving, and utilizing ESI are prohibitive. Word processing significantly lowered the cost of preparing pleadings, discovery requests and responses, motions, briefs, and other court papers. Technological advances have also dramatically altered the mode and presentation of evidence at trials. Additionally, greater sophistication on the part of enforcement agencies and the wrongdoers that they prosecute has led to more complicated cases.

Finally, discovery has not always operated in the cooperative and collegial manner anticipated by the drafters.⁴⁵ Discovery was

⁴³ 28 U.S.C. § 1407 (2012).

⁴⁴ See FED. R. CIV. P. 23 advisory committee's note.

⁴⁵ See *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 123 (3d Cir. 2009).

It would be reasonable to expect, in light of all the applicable rules and governing precedents, that experienced attorneys, especially those who have handled major litigation, would be able to proceed through the discovery and pretrial stages with a conciliatory attitude and a minimum of obstruction, and that, under the guiding hand of the district court, the path to ultimate disposition would be a relatively smooth one.

Id.

conceived by the drafters of the Federal Rules largely as a self-policing enterprise, with judicial intervention necessary only when the process breaks down. While discovery may proceed appropriately in many, if not most, federal civil cases, there is significant empirical research showing that discovery is problematic in complex cases.⁴⁶ Discovery abuse takes many forms—overdiscovery, failure to comply with legitimate discovery requests, redundant requests, inundating the discovering party with reams of paper, and frivolous objections, for example—and it inevitably creates costly and unproductive satellite litigation.

Nor did the drafters of the Federal Rules foresee that the procedures put in place under the rules would lead to a loss of confidence in the civil justice system. Among defendants and those likely to be named as defendants, a growing distrust of juries emerged.⁴⁷ Perceptions of runaway juries fueled calls for tort reform, a euphemism for hard caps on damage recoveries or out-and-out limitations on the right to sue.⁴⁸ The ability of lay jurors to reach reasoned results in complex litigation has also been called into question.⁴⁹

At first blush, criticisms of juries seem harsh. Juries are revered in the American civil justice system.⁵⁰ The right to a jury trial is rooted in the Seventh Amendment to the United States Constitution. It is particularly noteworthy that under English law, the source of the American jury system, the right to a jury trial has never been viewed as constitutional in nature. Not everyone shares the American reverence for juries. If you were to tell a defendant in a United States

⁴⁶ Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790 (1980).

⁴⁷ Michelle L. Findley, *Statutory Tort Caps: What States Should Do When Available Funds Seem Inadequate*, 46 IND. L. REV. 849, 853 (2013); see also Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 128 (2013) (noting an “increasing skepticism and distrust of juries” and concomitant “widespread assumption that judges are better than juries at avoiding cognitive pitfalls”).

⁴⁸ Findley, *supra* note 47, at 853; see WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 152–77 (1981).

⁴⁹ For example, it has been suggested that loss causation calculated by “lie-truth-drop” is needed because jurors cannot ascertain the financial impact of a misstatement. See John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo*, 60 BUS. L. 533, 533–34 (2005).

⁵⁰ 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 38.02 [1] (2d ed. 1971) (“The jury is like rock music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon the law.”).

court who comes from outside of the Anglo-American system that his or her case will be decided by six individuals, chosen at random, who know nothing about the parties or the facts, you would likely get looks of incredulity, if not abject horror.

The distrust of juries also extends to federal judges. Critics of the federal civil justice system call judges to task for their failure to control runaway verdicts through remittitur, granting of new trials on damages issues, or granting motions for judgment notwithstanding the verdict.⁵¹ Trial judges have also been faulted for failure to dismiss infirm cases on motions to dismiss or for summary judgment.⁵² As a result—critics contend—defendants are forced to settle cases, not on the merits, but rather to avoid large outlays to defend against claims of wrongdoing in court.⁵³

II

REACTIONS

Litigants have reacted to the perceived ills of the Federal Rules of Civil Procedure in three ways: (1) by pressing for rule changes, (2) by seeking changes to procedure through common law, and (3) by opting out of the judicial system.

A. Rule Changes

The perceived shortcomings of the Federal Rules can be changed through the amendment process. Initially, the Advisory Committee was slow to act. Even as cases grew more complicated and expensive through the 1960s and 1970s, and calls for reform came from many constituencies,⁵⁴ the Advisory Committee stood pat and declined to act. However, as criticism of the pretrial process persisted, the Advisory Committee responded with significant rule changes in 1983.

⁵¹ See, e.g., John E. Sullivan III, *Asset Protection for Ohioans: Why the Planning Is Better Outside Ohio*, 20 OHIO PROB. L.J. 74 (2009) (citing *DiCosta v. Aeronaves de Mexico, S.A.*, 973 F.2d 1490, 1494–98 (9th Cir. 1992)); see also Erwin Chemerinsky, *Closing the Courthouse Doors*, 14 GREEN BAG 2D 375, 389–90 (2011) (noting that the Supreme Court has “dramatically limited the availability of punitive damages based on distrust of juries” and also distrust of “the ability of trial judges to control their awards”).

⁵² See Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9–12 (1971) [hereinafter Handler, *The Shift*].

⁵³ *Id.*

⁵⁴ See Miller, *supra* note 2, at 360 (“Even then the defense bar and their clients were voicing complaints about abusive and frivolous litigation and the need for cost reduction—the drumbeat was constant and noisy.”).

1. Early Efforts

In 1976, at a symposium commemorating the seventieth anniversary of Roscoe Pound's speech on the popular dissatisfaction with the administration of justice, the Chief Justice of the United States Supreme Court and others called for sweeping changes to the federal legal system.⁵⁵ Following the 1976 Pound Conference, pretrial discovery became the focal point of criticism.⁵⁶ Critics contended that discovery had gotten out of control, and that high costs forced innocent defendants to buy peace rather than defend against insubstantial claims.⁵⁷ They called courts to task for not controlling discovery.⁵⁸ They sought to limit the scope of discovery, attacking the "relevant to the subject matter" and "reasonably calculated to lead to the discovery of admissible evidence" standards.⁵⁹ Critics, however, failed to craft a satisfactory alternative for standards that had been in effect since day one of the Federal Rules of Civil Procedure. The Advisory Committee resisted efforts to rein in the scope of discovery, contending that discovery abuse was not pervasive, and choosing instead to address specific abusive discovery practices in the 1980 Amendments.⁶⁰ That action did not assuage critics. Justice Powell,

⁵⁵ See generally *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

⁵⁶ William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978) ("Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm."); see also Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673, 678–79 (2013); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753–60 (1998).

⁵⁷ See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–41 (1975); see also Handler, *The Shift*, *supra* note 52, at 9–10 (describing how the costs of responding to discovery in a class action suit can exceed what individuals can afford and could force them to settle).

⁵⁸ See Francis R. Kirkham, *Complex Civil Litigation-Have Good Intentions Gone Awry?*, in *Addresses Delivered*, *supra* note 55, at 203:

Judges throw up their hands and ask how they can examine a million documents and say whether they are relevant, and the problem is all too often solved by simply giving plaintiffs access to all of defendant's files and records, relevant and irrelevant. And thus the second evil emerges—a massive and unequalled invasion of privacy and business records.

See also PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (asserting that discovery accounts for more than eighty percent of the time and cost of litigation).

⁵⁹ See Am. Bar Ass'n [ABA], Section of Litig., *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137, 157–58 (1980).

⁶⁰ Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980).

describing the 1980 Amendments to Rule 33 as “tinkering changes,” called for systemic reform.⁶¹

2. *The 1983 Amendments*

Stung by this criticism, the Advisory Committee then went back to work. The Supreme Court approved a new package of reforms in 1983 to combat abusive practices and tactical behavior in pleadings and in motion practice, in pretrial discovery, and at pretrial conferences by amending Rules 11, 16, and 26.⁶² Rule 11 was strengthened to provide for mandatory sanctions against parties engaged in abusive pleading practices.⁶³ Rule 16 as amended gave the judge more discretionary authority to manage the pretrial phase of the case, and it empowered the court to sanction parties who did not cooperate at pretrial conferences.⁶⁴ Rule 26 as amended mandated sanctions against parties engaged in abusive behavior on discovery.⁶⁵

The 1983 package represented a change in philosophy in dealing with abuse in the pretrial phase of the case, inaugurating a “get tough” policy and featuring an iron boot approach to effectuating attitudinal changes among members of the bar. The courts had always had the authority, both inherent and rule-based, to deal with abusive conduct in the pretrial phase of litigation.⁶⁶ Yet, the courts rarely invoked that authority. Rule 11 had been notably underutilized.⁶⁷ Moreover, courts were reluctant to impose discovery sanctions, preferring instead to

⁶¹ See *id.* at 1000 (Powell, J., dissenting).

⁶² ADVISORY COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE AND THEIR ADVISORY NOTES 1–2 (1982), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV03-1982.pdf>.

⁶³ FED. R. CIV. P. 11(c).

⁶⁴ FED. R. CIV. P. 16.

⁶⁵ FED. R. CIV. P. 26(g).

⁶⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258–59 (1975) (recognizing inherent powers of courts to sanction parties who have acted vexatiously or in bad faith); FED. R. CIV. P. 11, 37; see 28 U.S.C. § 1927 (2012); Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 503–511 (1986) [hereinafter Cavanagh, *Developing Standards*] (discussing courts’ ability to impose sanctions under the original Rule 11 and the amended Rule 11); see generally *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) (determining that a district court had the authority to impose sanctions for a party’s bad faith conduct); *Business Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533 (1991) (concluding that lower courts applied the correct standard when deciding a party’s monetary sanctions).

⁶⁷ See Cavanagh, *Developing Standards*, *supra* note 66, at 504–06.

cajole the parties into compliance.⁶⁸ The drafters concluded that this approach had not worked and charted a new course for discovery reform.

Even though the thrust of the 1983 Amendments was discovery reform, Rule 11 quickly became the most frequently used tool in the newly created sanctions arsenal.⁶⁹ The number of reported cases dealing with discovery sanctions has been far outstripped by the volume of Rule 11 cases.⁷⁰ Although the relative inactivity under Rule 26(g) does not conclusively demonstrate that discovery abuse has been eliminated, one can fairly assume that if discovery abuse remained a significant problem after the 1983 Amendments took effect, parties and the courts would have utilized Rule 26(g) sanctions to a far greater extent than they have in fact. Accordingly, assertions made subsequently—particularly by a Brookings Institute study⁷¹ finding that discovery abuse remained a problem in the late 1980s—are questionable.

3. The 1993 Amendments

The far-reaching changes implemented by the 1983 Amendments, however, did not quell the cries for reform. Each of the three branches of the federal government responded by the end of the decade. Congress established the Federal Courts Study Committee in 1988.⁷² Then-Senator Joe Biden and others introduced the Civil Justice

⁶⁸ See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 774–76 (1985) [hereinafter Cavanagh, *The 1983 Amendments*].

⁶⁹ Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 572 (1997) [hereinafter Cavanagh, *Requiescat*].

⁷⁰ *Id.*

⁷¹ See BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989) [hereinafter JUSTICE FOR ALL]. The Brookings Institute Task Force was convened at Chairman Biden's request. JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 1 (1996) [hereinafter THE RAND REPORT]. It included: "leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges, and law professors," but no sitting judges. *Id.*

⁷² Federal Courts Study Act of 1988, Pub. L. No. 100-702, 102 Stat. 4644 (1990). The Federal Courts Study Committee consisted of fifteen members named by the Chief Justice and charged with addressing the perceived crises in the federal court system and reporting to Congress on how to remedy that crisis.

Reform Act⁷³ (CJRA), a master plan for sweeping procedural reform of the federal civil justice system; at the grass roots, it was aimed at reducing unnecessary cost and delay in civil litigation and assuring that the federal courts would be accessible to all litigants and not only to those who are well-off financially.

Persuaded by two well-publicized studies⁷⁴ that had concluded that litigation in the federal courts was too costly and too slow, and concerned that procedural reform efforts under the Rules Enabling Act were “incremental and languid,”⁷⁵ Congress adopted the CJRA,⁷⁶ which featured a “bottom-up” approach to reform that required each federal district court to assess the specific causes of unnecessary cost and delay within that district. Each district was then mandated to design a plan to address these problems. In designing cost and delay reduction plans, districts were encouraged to experiment and innovate. Congress hoped that this process would generate creative solutions locally that could then be implemented nationally.

At about the same time that the CJRA was being debated in Congress, the Advisory Committee, which had already been revisiting mandatory sanctions under Rule 11,⁷⁷ also considered the desirability of further discovery reform, including numerical limits on interrogatories and depositions. The enactment of the CJRA not only galvanized the Advisory Committee into action, but it also put the Advisory Committee under considerable pressure to develop rules that would be compatible with CJRA reform principles and, at the same time, leave room for local experimentation.⁷⁸ From this effort

⁷³ Civil Justice Reform Act of 1990 [CJRA], Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–82 (2012)).

⁷⁴ See generally JUSTICE FOR ALL, *supra* note 71; HUMPHREY TAYLOR & GARY L. SCHERMUND, PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM: A STUDY CONDUCTED FOR THE FOUNDATION FOR CHANGE, INC. (1989), reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 91–184 (1990); R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 689 n.13 (1993).

⁷⁵ Jeffrey J. Peck, “Users United”: *The Civil Justice Reform Act of 1990*, 54 L. & CONTEMP. PROBS. 105, 107–09 (1992).

⁷⁶ Judicial Improvements Act of 1990, Pub. L. 101-650, tit. I, 104 Stat. 5089 (codified at 28 U.S.C. § 471).

⁷⁷ *Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the U.S., Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules* (Aug. 1990), reprinted in 131 F.R.D. 335 (1990).

⁷⁸ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 58 (“[T]he 1993 revision of the discovery rules authorizing local variations was put forward by the Civil Rules Committee of that time in the belief that authority for local rules was needed if

emerged the 1993 Amendments to the Federal Rules of Civil Procedure.

The 1993 Amendments had two prominent features. First, they abolished mandatory sanctions under Rule 11 and left the issue to the trial court's discretion.⁷⁹ The Advisory Committee was concerned that Rule 11 sanctions had become routine, and that the threat of mandatory sanctions had a chilling effect on meritorious claims.⁸⁰

Second, the 1993 Amendments further refined the discovery process by (1) mandating automatic disclosure (production without prior request) of certain facts,⁸¹ expert testimony,⁸² trial evidence,⁸³ and the identity of witnesses;⁸⁴ (2) presumptive limits on the number of interrogatories⁸⁵ (twenty-five) and depositions (ten per side);⁸⁶ (3) requiring counsel to meet and confer to develop a discovery plan prior to the commencement of discovery;⁸⁷ and (4) mandating a pre-discovery conference with the court.⁸⁸ These Amendments took effect nearly three years after the enactment of the CJRA;⁸⁹ and, in some cases, the new national rules were at odds with cost-reduction plans adopted by district courts pursuant to the CJRA.⁹⁰ To avoid inconsistencies with the CJRA plans, the 1993 Amendments authorized local district courts to opt out of the new discovery standards, and more than half of the federal courts elected to do so.⁹¹

discovery variations were to be legitimately included in local plans promulgated under the CJRA.”).

⁷⁹ FED. R. CIV. P. 11.

⁸⁰ See *supra* note 68.

⁸¹ FED. R. CIV. P. 26(a)(1).

⁸² FED. R. CIV. P. 26(a)(2).

⁸³ FED. R. CIV. P. 26(a)(3).

⁸⁴ *Id.*

⁸⁵ FED. R. CIV. P. 33(a).

⁸⁶ FED. R. CIV. P. 30(a)(2)(A).

⁸⁷ FED. R. CIV. P. 26(f).

⁸⁸ FED. R. CIV. P. 16(b).

⁸⁹ See Civil Justice Reform Act of 1990 [CJRA], Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–482 (2012)).

⁹⁰ See FED. R. CIV. P. 26(a)(1).

⁹¹ DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 6 (1994) (“Altogether, 52 courts have exempted cases from the requirements of Rule 26(a)(1). Of these, however, sixteen require disclosure through local rules or orders or the CJRA plan, and thirteen specifically give individual judges authority to require initial disclosure.”); see generally Cavanagh, *Requiescat*, *supra* note 69, at 591.

Mandatory automatic disclosure was easily the most controversial feature of the 1993 discovery amendments. Voluntary disclosure of information—the exchange of relevant materials without the necessity of a formal discovery request—is a laudable goal and, if implemented widely, would likely achieve significant savings during the discovery phase of a case. At the same time, it is pure Pollyanna to think that, in the real world of federal litigation at this point in time, voluntary disclosure could lessen significantly the need for formal discovery. Voluntary disclosure runs contrary to many lawyers' instincts. The trial of a civil case in federal court is an adversary process. So too is the pretrial phase of the case. It is hard enough to get parties to turn over information, especially prejudicial information, when specifically requested on discovery. Accordingly, it is naïve to think that parties would be willing to exchange this information voluntarily. It is especially naïve for Congress to offer this vehicle as a cost-savings device when a principal concern of the Brookings Institute study was discovery abuse.⁹²

The futility of mandatory automatic disclosure is further illustrated by the failure of mandatory automatic disclosure under Rule 26(a)(1) of the Federal Rules of Civil Procedure to gain any significant following.⁹³ Perhaps no amendment to the Federal Rules has been as vilified as mandatory automatic disclosure.⁹⁴ As noted above, a significant number of district courts rejected mandatory automatic disclosure outright.⁹⁵ Mandatory automatic disclosure has not caught on with the profession, and indeed it has continued to engender criticism long after its adoption in 1993.⁹⁶ It has been reduced to a

⁹² See JUSTICE FOR ALL, *supra* note 71.

⁹³ See STIENSTRA, *supra* note 91.

⁹⁴ Compare George F. Hritz, *Plan Will Increase Cost, Delay Outcomes*, N.Y. L.J., Apr. 13, 1993, at 2 (predicting that automatic disclosure will prove costly and inefficient), and Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992) (questioning viability of mandatory disclosure), and Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15 (commenting that mandatory disclosure impinges on work product and attorney/client protections), with Charles P. Sifton, *Experiment a Bold and Thoughtful Step*, N.Y. L.J., Apr. 13, 1993, at 3 (noting that automatic disclosure in most cases will make civil discovery less adversarial), and Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 267 (arguing that mandatory disclosure amendments to Rule 26 will reduce costs and delay).

⁹⁵ See *supra* note 91.

⁹⁶ See Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 76 (2000) ("Practically all elements of the organized bar vociferously criticized the suggestions for automatic disclosure").

nonevent. If mandatory automatic disclosure has failed, then a fortiori, voluntary disclosure is doomed to failure.

4. The 2000 Amendments

On January 28, 1997, the RAND Corporation—which had been commissioned by the Judicial Conference of the United States pursuant to the CJRA to conduct an empirical study of the efficacy of the CJRA reforms—released its final report.⁹⁷ The RAND study concluded that, as implemented, the package of reforms embodied in the CJRA had had no real impact on the “time to disposition, litigation costs, and attorney’s satisfaction and views of the fairness of case management.”⁹⁸ The RAND study further concluded that neither mandatory automatic disclosure nor voluntary disclosure had had any meaningful impact in reducing costs and delays in litigation.⁹⁹ The RAND study suggested that courts could best limit excessive cost and delay by setting and adhering to strict deadlines for the completion of discovery and the commencement of trial.¹⁰⁰

Congress mercifully allowed the CJRA to sunset on December 31, 1997, as prescribed by the statute itself.¹⁰¹ The CJRA’s death set the stage for the next phase of discovery reform. In 2000, the Federal Rules introduced further restrictions on discovery depositions by presumptively limiting a deposition to one seven-hour day.¹⁰² The new rules also significantly trimmed back the mandatory automatic disclosure obligations under Rule 26(a). The 2000 amendments require disclosure of: (1) the identity of the witnesses and documents that a party will use to support its claim or defense, (2) the identity of retained testifying experts, and (3) the identity of evidence that a party

⁹⁷ See THE RAND REPORT, *supra* note 71. The foregoing report is actually an executive summary of three technical reports comprising RAND’s analysis of the CJRA. *Id.* at v. Prepared for the Judicial Conference, the RAND Report “provides an overview of the purpose of the CJRA, the basic design of the evaluation, the key findings, and their policy implications.” *Id.* The three technical reports are: JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996).

⁹⁸ THE RAND REPORT, *supra* note 71, at 1.

⁹⁹ *Id.* at 16–17.

¹⁰⁰ *Id.* at 1–2.

¹⁰¹ See Pub. L. 101-650, 104 Stat. 5090, § 103(b)(2) (1990).

¹⁰² See FED. R. CIV. P. 30(d)(1).

contemplates using at trial.¹⁰³ In addition, the Federal Rules, for the most part, no longer allow individual districts to opt out by local rule.¹⁰⁴

In perhaps the most far-reaching change ever made by the Advisory Committee, the 2000 Amendments significantly narrowed the scope of discovery from “relevant to the subject matter” to “relevant to any party’s claim or defense.”¹⁰⁵ Nevertheless, if a party finds that discovery is inadequate under the “relevant to any party’s claim or defense” standard, that party can then seek court permission to obtain discovery of materials “relevant to the subject matter” of the litigation.¹⁰⁶ The upshot of the amended rule is that discovery is presumptively limited to matters relevant to a claim or defense, and only upon a showing to the court that such discovery is inadequate can additional discovery be obtained.¹⁰⁷

5. *The 2006 Amendments*

In 2006, in recognition of the enormous importance of information stored on electronic media, the Advisory Committee adopted rules dealing specifically with electronically stored information. The amendments clarify that electronically stored information is equivalent to the paper document stored in hard copy.¹⁰⁸ The Federal Rules direct parties to address issues relating to electronically stored information during the discovery planning process and that pretrial scheduling orders include provisions for discovery of electronically stored information.¹⁰⁹ The Federal Rules also contained detailed provisions for sanctions for failure to comply with discovery requests for electronically stored information.¹¹⁰ However, the rules leave it up

¹⁰³ See FED. R. CIV. P. 26(a)(1)–(3).

¹⁰⁴ See COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT ON THE ADVISORY COMMITTEE ON CIVIL RULES 47 (1999) [hereinafter REPORT ON THE ADVISORY COMMITTEE], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-1999.pdf> (“[The 2000 Amendments] narrow the initial disclosure obligation and remove the previous authority to ‘opt out’ of this requirement by local rule.”).

¹⁰⁵ See *id.* at 5–6; FED. R. CIV. P. 26(b)(1).

¹⁰⁶ See REPORT ON THE ADVISORY COMMITTEE, *supra* note 104, at 5–6; FED. R. CIV. P. 26(b)(1) (“For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

¹⁰⁷ See REPORT ON THE ADVISORY COMMITTEE, *supra* note 104, at 48.

¹⁰⁸ FED. R. CIV. P. 34(a)(1)(A).

¹⁰⁹ FED. R. CIV. P. 16(b)(3)(B)(iii), 26(f)(3)(C).

¹¹⁰ FED. R. CIV. P. 37(f).

to the courts to determine any limitations on discovery of electronically stored information on a case-by-case basis.¹¹¹

6. *The Proposed 2015 Amendments*

The Advisory Committee has proposed a series of rule changes that are designed to promote early and effective judicial case management by (1) accelerating the timeframe for filing complaints and issuing scheduling orders; (2) directing that scheduling conferences be conducted in person or through simultaneous communication, thereby eliminating scheduling conferences by mail; (3) mandating that scheduling orders address subjects, including (a) preservation of electronically stored documents, (b) agreements to prevent waiver of privilege or work product under Rule 502 of the Federal Rules of Evidence, and (c) pre-motion conferences in which the court is asked to intervene in discovery matters; (4) adding two items to the discovery plan under Rule 26(f): the preservation of electronically stored information and agreements to protect against waiver of privilege or work product under Rule 502 of the Federal Rules of Evidence; and (5) modifying the existing discovery timeline to permit filing Rule 34 document requests prior to the Rule 26(f) discovery conference.¹¹²

a. Timing of Complaint and Scheduling Order

The Advisory Committee is of the view that early stages of litigation take too long, thereby adding to the cost of litigation.¹¹³ Accordingly, the proposed amendments shorten the time in which to

¹¹¹ FED. R. CIV. P. 26(b)(2), 16(b). The Advisory Committee note to Rule 26 suggests that a judge consider the following factors in determining whether to allow discovery of electronically stored information:

(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

¹¹² COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT ON THE ADVISORY COMMITTEE ON CIVIL RULES 4–6, 18–19, 22–23 (2013) [hereinafter 2013 ADVISORY COMMITTEE REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf>.

¹¹³ *Id.* at 4.

serve a complaint from 120 days to 60 days from the date of filing.¹¹⁴ The proposed amendments also reduce the time for issuing a scheduling order from 120 days after a defendant has been served or 90 days after a defendant has appeared, to 90 days and 60 days, respectively.¹¹⁵

b. Scheduling Conferences

The Advisory Committee is of the view that scheduling conferences are most effective if parties engage, via telephone or through “more sophisticated electronic means.”¹¹⁶ Accordingly, the current authorization to conduct scheduling conferences by mail is abrogated.¹¹⁷

c. Additional Topics for Scheduling Orders

Authorizing scheduling orders to provide for preservation of electronically stored information, and to include agreements to prevent waiver of privilege and work product, are intended to remind litigants that these are useful topics to discuss and agree upon at the outset of litigation.¹¹⁸ The proposed rule authorizing pre-motion conferences on discovery issues was added in light of the experience of many judges who find that such conferences can resolve disputes informally without the need for formal briefs, thereby saving the litigants, and the courts, both time and money.¹¹⁹ The question of whether to require such promotion conferences falls within the judge’s discretion.¹²⁰

d. Content of Discovery Plans

Consistent with the above-discussed proposals affecting the content of scheduling orders under proposed Rule 16(b)(3), discovery plans may include provisions for the preservation of electronically stored information and court orders on agreements under Rule 502 of the Federal Rules of Evidence to prevent waiver of privilege and attorney work product.¹²¹

¹¹⁴ *Id.* at 4, 17 (Proposed Rule 4(m)).

¹¹⁵ *Id.* at 18–19 (Proposed Rule 16(b)(2)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 18 (Proposed Rule 16(b)(1)).

¹¹⁸ *Id.* at 7 (Proposed Rule 16(b)(3)).

¹¹⁹ *Id.* at 7–8 (Proposed Rule 16(b)(3)(v)).

¹²⁰ *Id.* at 8.

¹²¹ *Id.* at 19 (Proposed Rules 16(b)(3)(B), 26(f)(3)(C)–(D)).

e. Accelerating the Timing of Document Requests

By relaxing the discovery moratorium to permit document requests prior to the entry of a Rule 26(f) discovery plan, the Advisory Committee intended to promote focused discussion of those document demands during the discovery conference.¹²² This procedure would assist with early discovery planning and also allow concrete disputes over the scope of discovery to be brought before the court at the outset of the litigation.¹²³ The Advisory Committee hopes to promote discussions regarding document requests at discovery conferences so that parties resolve more disputes without judicial intervention.¹²⁴

7. Summary

Unquestionably, the Advisory Committee on Federal Civil Rules has recognized the changing face of federal civil litigation, especially the mounting costs and increased complexity of modern cases. The Advisory Committee also has always been at the forefront of the debate about how to address these issues. Its response has generally been deliberate and incremental, reflecting a strong faith in the wisdom of the rules as initially promulgated. For example, the Advisory Committee for years resisted limiting the scope of discovery and imposing numerical limits on interrogatories and depositions.¹²⁵

Yet, the rules, notably the rules governing discovery, *have changed* significantly since 1938. No longer can parties pursue a “scorched earth” or “no stone unturned” discovery agenda. Discovery must be proportional to the needs of the case. Interrogatories and depositions are subject to presumptive limitations. Trial courts have broad powers to manage discovery and to thereby rein in unnecessary costs and delays. Nevertheless, not all litigants were thrilled with the actions of the Advisory Committee, and they turned directly to the courts to achieve change.

B. The Courts

The Supreme Court has been notably active in effectuating procedural reforms in two areas: summary judgment and pleading standards. At the summary judgment stage, trial courts must

¹²² *Id.* at 8–9 (Proposed Rule 26(d)(2)).

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 107.

thoroughly assess the evidence developed on discovery to assure that the parties have presented genuine issues of fact for juries to decide. Similarly, the High Court has directed trial judges to carefully scrutinize complaints at the motion to dismiss stage to satisfy themselves that the claims asserted warrant the costs of discovery.

1. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if it can show that, based on the pleadings and all materials properly before the court, there is no genuine dispute as to any material fact, and that the movant is entitled to judgment as a matter of law.¹²⁶ The summary judgment procedure has always been part of the Federal Rules; yet, in its early years, Rule 56 was underutilized.¹²⁷ This was due, in part, to the perception among some judges that granting summary judgment would somehow short circuit the litigants' rights to their day in court, a fundamental goal of the Federal Rules.¹²⁸ In addition, there was concern that summary judgment was simply inappropriate in certain kinds of cases, such as antitrust cases. The Supreme Court's decision in *Poller v. CBS, Inc.* is instructive here.¹²⁹ In *Poller*, the Court denied defendant's summary judgment motion, holding that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."¹³⁰ Some observers viewed *Poller* as effectively reading summary judgment out of antitrust cases,¹³¹ even though the Supreme Court subsequently—and explicitly—rejected that notion shortly after *Poller* came down.¹³²

Added to the ambiguity of the *Poller* holding was the ambiguity of Rule 56 itself. The rule did not define "genuine issue" or "material

¹²⁶ FED. R. CIV. P. 56.

¹²⁷ See 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56App.101[3] (3d ed. 1999) (noting a general sense that summary judgment was "extremely difficult to obtain").

¹²⁸ See *Hamilton v. Sec'y of Health & Human Servs.*, 961 F.2d 1495, 1504 (10th Cir. 1992) (expressing concern that summary judgment may hinder plaintiff's ability to fully present its case).

¹²⁹ 368 U.S. 464 (1962).

¹³⁰ *Id.* at 473.

¹³¹ See EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:3, at 309–10 (3d ed. 2006).

¹³² See *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–90 (1968).

fact.”¹³³ It was unclear who had the burden of proof on a summary judgment motion—whether that burden paralleled the burdens at trial and how that burden was met on the motion.¹³⁴ In the face of these uncertainties, courts understandably were hesitant to grant summary judgment. That, in turn, caused defendants to lose faith in the supervisory powers of the courts and their will to dismiss infirm cases prior to trial.¹³⁵

All of that changed in the spring of 1986, when the Supreme Court handed down three decisions that clarified and revitalized summary judgment procedures.

a. Matsushita

In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, Zenith, an American electronics firm, sued rival Japanese electronics manufacturers alleging, inter alia, that the Japanese sellers had conspired to drive Zenith from the field by agreeing to engage in predatory pricing, that is, selling below their costs.¹³⁶ The defendants moved for summary judgment.¹³⁷ *Matsushita* presented significant substantive and procedural issues. Substantively, the question was whether a predatory pricing scheme is even a plausible competitive tactic.¹³⁸ The theory of a predatory pricing claim is that a dominant seller or group of sellers with deep pockets can drive targeted rivals out of business by selling at a loss.¹³⁹ Deep pocket predators can withstand short-term losses better than the target.¹⁴⁰ Once the target has exited the field, the dominant seller has the market to itself, can reap monopoly profits, and can recoup any short-term losses suffered while the scheme was in place.¹⁴¹

¹³³ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2097 (1989).

¹³⁴ See *id.* at 2100–01, 2100 n.168.

¹³⁵ See *id.* at 2097 (“Rule 56 has been enfeebled by courts reluctant to take responsibility for assessing the genuineness of contentions.”).

¹³⁶ 475 U.S. 574, 577–78 (1986).

¹³⁷ *Id.* at 578.

¹³⁸ *Id.* at 588–90.

¹³⁹ See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986).

¹⁴⁰ See *id.*

¹⁴¹ *Matsushita*, 475 U.S. at 588–89.

In the real world, however, a predatory pricing strategy is very risky and simply does not make rational business sense.¹⁴² First, for the scheme to succeed, the predator must incur losses in the short term.¹⁴³ This would be anathema for most companies, which operate on a for-profit model.¹⁴⁴ A predatory pricing scheme is not like selling at low profit margins in which large volume would yield large profits.¹⁴⁵ In a predatory pricing scenario, every sale exacerbates losses. Simply put, a predator does not “make it up on volume.”

Second, assuming the dubious proposition that a company is willing to incur losses to force out a rival, it is not clear how long losses would have to be incurred before the target exited the field. In *Matsushita*, the scheme was allegedly in place for more than twenty years and still had not brought Zenith to its knees.¹⁴⁶ Few companies would commit to open-ended losses in the hope that sooner or later a rival would capitulate.

Third, even if the defendants could successfully drive Zenith from the field, there is no guarantee that a new company would not arise from the ashes and emerge as a viable rival.¹⁴⁷ In that case, the process of selling at a loss would begin anew. Given the inherent risks of a predatory pricing scheme, rational sellers would be hesitant to embrace it as a plausible business strategy.

In addition to these substantive issues, *Matsushita* raised significant procedural issues. Did Zenith present sufficient evidence to create a genuine issue of material fact sufficient to defeat the summary judgment motion? Zenith’s only real evidence of agreement was that defendants sold at low prices.¹⁴⁸ That evidence was at best ambiguous.¹⁴⁹ It may be that defendants had conspired to set low prices. However, an equally plausible explanation of defendants’ conduct was that they were aggressively competing for sales.¹⁵⁰ The low prices spurred competition and benefitted consumers.¹⁵¹ In other

¹⁴² *Id.*

¹⁴³ *Id.* at 588.

¹⁴⁴ *See id.*

¹⁴⁵ *See Cargill*, 479 U.S. at 118 (“price cutting [is] aimed simply at increasing market share”).

¹⁴⁶ *Matsushita*, 475 U.S. at 592.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 594.

¹⁴⁹ *See id.* (“But cutting prices in order to increase business often is the very essence of competition.”).

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

words, defendants' conduct was arguably consistent with the antitrust laws.

The Supreme Court concluded that Zenith had failed to create a genuine issue of material fact; this is, it failed to adduce sufficient evidence to raise a question about which reasonable people could disagree.¹⁵² The Court ruled that the range of inferences that can be drawn from ambiguous evidence on a motion for summary judgment is limited.¹⁵³ Conduct that is as consistent with competition as it is with an antitrust violation is insufficient as a matter of law to create a jury question.¹⁵⁴ In such a situation, a plaintiff must come forward with additional evidence to defeat the summary judgment motion.¹⁵⁵ A plaintiff must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently."¹⁵⁶ The plaintiff must show "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiff]."¹⁵⁷

Matsushita put to rest any notion that summary judgment is inappropriate in antitrust cases. Rule 56 applies equally to all actions in federal court. *Matsushita* also made clear that the standards for summary judgment and for judgment as a matter of law are one in the same.¹⁵⁸ Finally, *Matsushita* made clear that to defeat a summary judgment motion, a plaintiff must do more than raise "metaphysical doubt";¹⁵⁹ rather, it must adduce evidence about which reasonable persons could disagree.

b. Celotex

In *Celotex Corp. v. Catrett*, an asbestos case, defendant moved for summary judgment, arguing that plaintiff had failed to adduce evidence that exposure to defendant's asbestos products was the

¹⁵² *Id.* at 596–97 ("if [as here] petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy" (citation omitted)).

¹⁵³ *See id.* at 588 (citation omitted).

¹⁵⁴ *Id.* (citation omitted).

¹⁵⁵ *Id.* (citation omitted).

¹⁵⁶ *Id.* (citation omitted) (internal quotation marks omitted).

¹⁵⁷ *Id.* (citation omitted).

¹⁵⁸ *See id.* The term "judgment as a matter of law" replaced "directed verdict" in the 1991 Amendments to Rule 50 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 50 advisory committee's note.

¹⁵⁹ *Id.* at 586 (citation omitted).

proximate cause of plaintiff's injuries, an element of plaintiff's claim upon which she would bear the burden of proof at trial.¹⁶⁰ The Court of Appeals ruled that defendant, having failed to introduce evidence tending to negate any exposure, was not entitled to judgment as a matter of law.¹⁶¹

The Supreme Court reversed, holding that summary judgment was proper because plaintiff failed to show the existence of an element essential to which she had the burden of proof at trial.¹⁶² Such a complete failure of proof with respect to an essential element of the case renders all other facts in the case immaterial.¹⁶³ The Court also made clear that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"¹⁶⁴

c. *Anderson*

Anderson v. Liberty Lobby, Inc. was a defamation action by a "citizen's lobby" against a magazine.¹⁶⁵ The Supreme Court held that the standard of proof on a motion for summary judgment must mirror the standard of proof at trial.¹⁶⁶ Here, to succeed at trial, plaintiff would have to prove, by clear and convincing evidence, malice on the part of the defendant.¹⁶⁷ Because the Court of Appeals applied the wrong standard, the Court remanded the case for further proceedings.

The 1986 trilogy was a clear signal from the Supreme Court that the summary judgment procedure was an integral part of the Federal Rules of Civil Procedure, and that where the Rule 56 standards are met, courts should not hesitate to grant summary judgment.

2. *Pleading Standards*

The Federal Rules incorporated the common law demurrer, which allowed the defendant to test the legal sufficiency of the pleadings at

¹⁶⁰ 477 U.S. 317, 319–20 (1986).

¹⁶¹ *Id.* at 321.

¹⁶² *Id.* at 322–23.

¹⁶³ *Id.* at 323.

¹⁶⁴ *Id.* at 327 (citation omitted).

¹⁶⁵ 477 U.S. 242, 244–45 (1986).

¹⁶⁶ *Id.* at 252.

¹⁶⁷ *Id.* at 257.

the outset of a case.¹⁶⁸ Accordingly, the Federal Rules permit judgment as a matter of law in cases in which the complaint fails to state a claim upon which relief may be granted.¹⁶⁹ But, what does that language mean? As a threshold matter, the drafters of the Federal Rules purposefully chose that language over the formulation of failure to state a *cause of action* used in the codes and in common law pleading jurisdictions.¹⁷⁰ The Federal Rules eschewed the notion, adopted by the codes and by the common law, that a complaint must assert all elements of a cause of action.¹⁷¹ Rather, the Federal Rules required only facts sufficient to put the defendant on notice of the claim.¹⁷²

In *Conley v. Gibson*, decided some twenty years after the promulgation of the Federal Rules, the Supreme Court held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁷³ The Court went on to explain that Rule 8(a)(2) requires that the complaint “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹⁷⁴ The “no set of facts” language sets a high bar for defendants seeking to dismiss a complaint on a Rule 12(b)(6) motion. Taken literally, the language of *Conley* would vitiate almost all motions to dismiss.

Notwithstanding the demanding standards of *Conley*, many trial courts granted motions to dismiss. However, enough courts balked at motions to dismiss on *Conley* grounds to cause concern among defendants who felt that under *Conley*, paper-thin complaints could license expensive discovery, which would leave defendants with no choice but to pay to settle the matter, irrespective of the merits of

¹⁶⁸ See Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 194–95 (1957–58); FED. R. CIV. P. 12(b)(6).

¹⁶⁹ FED. R. CIV. P. 12(b)(6).

¹⁷⁰ See Clark, *supra* note 168, at 187; see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 23–24 (2010) [hereinafter Miller, *Double Play*] (The Federal Rules “substitut[e] ‘short and plain’ and ‘claim for relief’ for any reference to the troublesome code categories of ‘facts,’ ‘conclusions,’ ‘evidence,’ and ‘cause of action.’”); see generally WRIGHT & MILLER, *supra* note 7, §§ 1215–1216.

¹⁷¹ See Clark, *supra* note 168, at 186–87.

¹⁷² See *id.*

¹⁷³ 355 U.S. 41, 45–46 (1957).

¹⁷⁴ *Id.* at 47.

plaintiffs' claim.¹⁷⁵ Efforts to engage the Advisory Committee on Rule 12(b)(6) standards failed, and so defendants turned to the courts.

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court revisited the concept of notice pleading, the proper construction of Rule 8(a)(2), and the continuing viability of *Conley*.¹⁷⁶ *Twombly* was a putative class action antitrust suit by subscribers of local telephone services and high-speed Internet access in the New York City area.¹⁷⁷ Plaintiffs alleged that defendants—the four providers of local telephone services in the United States—had violated section one of the Sherman Act by conspiring (1) not to provide interconnect services to new entrants in the local telephone market as required by the Telecommunications Act of 1996 and (2) not to compete with each other in what heretofore had been exclusive territories.¹⁷⁸

Although the complaint alleged that the defendants' conduct was the result of a conspiracy, it contained no factual allegations of agreement.¹⁷⁹ That is, the complaint did not set forth the times and places of any conspiratorial meetings, the participants therein, or the contents of any agreement.¹⁸⁰ Rather, the plaintiffs claimed that conspiracy could be inferred from the fact that defendants had declined to compete in each other's territories, and that at least one defendant had frustrated entry into the local telephone market by refusing to cooperate in providing interconnect services with the prospective new entrant.¹⁸¹

Defendants countered that in the absence of factual allegations of agreement, the complaint, at best, alleged conscious parallelism among the defendants.¹⁸² As a matter of substantive antitrust principles, conscious parallelism is not enough to make out a violation of section one of the Sherman Act.¹⁸³ Given that the plaintiffs had failed properly to allege conspiracy, the defendants were entitled to judgment as a matter of law¹⁸⁴ and were not forced to

¹⁷⁵ See Miller, *Double Play*, *supra* note 170, at 8–9, 14.

¹⁷⁶ 550 U.S. 544 (2007).

¹⁷⁷ *Id.* at 550–51.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* at 551.

¹⁸⁰ *Id.* at 551–52 n.2.

¹⁸¹ See *id.* at 550–51.

¹⁸² See *id.* at 552.

¹⁸³ *Id.* at 553.

¹⁸⁴ *Id.* at 570.

bear the expense of discovery and the related burdens of antitrust litigation.

In dismissing the complaint, the Supreme Court took the opportunity to revisit pleading requirements under Rule 8(a)(2).¹⁸⁵ The Court acknowledged that the Federal Rules had relaxed pleading standards from the stringent demands under the codes and at common law.¹⁸⁶ Yet, the Court pointed out that it would be a mistake to “suggest[] that the Federal Rules somehow dispensed with the pleading of facts altogether.”¹⁸⁷ Rather, the Federal Rules simply relieved the plaintiff of the obligation of setting forth the claim in detail in the pleadings.¹⁸⁸

A plaintiff must make a “showing” that it is “entitled” to relief.¹⁸⁹ This involves “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹⁹⁰ To survive a motion to dismiss, the complaint must state a claim that is “plausible”; that is, it must provide “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].”¹⁹¹ Accordingly, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.”¹⁹²

Of greater interest is the Court’s rationale in *Twombly*. A principal objective of *Twombly*’s heightened pleading standard was to stem the high cost of discovery. The Court admonished trial courts not “to forget that proceeding to antitrust discovery can be expensive” and also observed that high discovery costs may force defendants to settle matters early on the litigation timeline, irrespective of the merits of the plaintiff’s claim.¹⁹³ The Court further opined that tools traditionally used to identify and eliminate infirm claims—case management, supervised discovery, summary judgment, and jury instructions—simply do not work, relying on Judge Easterbrook’s observations in a 1989 law review comment that courts are powerless

¹⁸⁵ *Id.* at 554–62.

¹⁸⁶ *See id.* at 555 n.3.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 555.

¹⁸⁹ *Id.* at 555, 557.

¹⁹⁰ *Id.* at 555.

¹⁹¹ *Id.* at 556.

¹⁹² *Id.*

¹⁹³ *Id.* at 558–59.

to control the claims presented in a case and to control the costs of discovery.¹⁹⁴

In so ruling the Court ignored the Federal Rules of Civil Procedure and particularly the 1983, 1993, and 2000 Amendments, which, as discussed above, conferred broad managerial powers on federal judges.¹⁹⁵ It is simply not possible that the Court in 2007 was unaware of these developments, nor is it likely that the Court was ignorant of empirical research demonstrating that discovery abuse leading to excessive trial preparation costs was not a problem in the vast majority of cases litigated in the federal courts.¹⁹⁶

The salient question is why the Court ruled as it did in *Twombly*. The *Twombly* ruling was a marked departure from the decision in *Leatherman v. Tarrant County* a decade earlier in which the Court stated unequivocally that pleading was a matter for the Advisory Committee, not the courts:

Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.¹⁹⁷

Moreover, it is undeniable that the Court's rejection of *Leatherman* was purposeful:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. *See, e.g.,* Easterbrook, *Discovery as Abuse*, 69 B. U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to

¹⁹⁴ *Id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989)).

¹⁹⁵ *See supra* Part II.B.2.-4.

¹⁹⁶ *See* Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 24-25 (2008).

¹⁹⁷ *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

juries”[;] . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “‘reasonably founded hope that the [discovery] process will reveal relevant evidence’” to support a § 1 claim.¹⁹⁸

If excessive discovery costs are truly the problem that the Court seeks to address, perhaps the better solution is to incentivize district courts to enforce the discovery limitations authorized by the Federal Rules. The Court cited no post-1989 case law or data on the efficacy of discovery limitations, which is really the relevant timeframe here. In any event, the Court’s decision that the appropriate way to address the problem of excessive discovery costs—dismissing suspect claims at the outset of the litigation—seems counterintuitive. The parties and the court know the least about the respective claims and defenses at the motion to dismiss stage. Still, the Court opted for the most drastic remedy, dismissal prior to discovery. This approach undermines a basic premise of discovery—equal access to proof¹⁹⁹—and thereby puts antitrust plaintiffs at a severe disadvantage; defendants have exclusive control of all evidence of conspiracy and overt acts in furtherance thereof. This approach also puts antitrust plaintiffs in a catch-twenty-two situation: they must plead facts showing conspiracy, but they are denied access to discovery of those facts through the preemptive motion to dismiss.

Twombly has been the subject of much discussion since the day it was decided.²⁰⁰ However, the decision has turned out not to be the scourge that its critics feared. Empirical studies reveal only a modest uptick in the granting of motions to dismiss.²⁰¹ Nevertheless, the question remains as to whether such a far-reaching change in pleading standards was a matter for the courts, or whether any changes should

¹⁹⁸ *Twombly*, 550 U.S. at 559 (alteration in original).

¹⁹⁹ See Miller, *supra* note 2, at 289.

²⁰⁰ See, e.g., Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 103.

²⁰¹ See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, at vii (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); see also Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Committee and Standing Rules Committee 4 (Dec. 15, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (“[C]ase law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.”).

have been left to the rulemaking process. Federal courts have the power to interpret the Federal Rules but no power to amend them.

Some commentators have argued that *Twombly* improperly crossed the line into rulemaking.²⁰² *Twombly* is surely close to the line, if not crossing the line. Indeed *Twombly* went much further than *Matsushita*. In *Matsushita*, the Court merely construed the term “genuine issue of material fact” in Rule 56(c) in order to determine whether summary judgment should have been entered on the record before the Court.²⁰³ *Twombly*, on the other hand, enunciated a new pleading standard that raised the bar for plaintiffs to get by a motion to dismiss and to be in a position to make discovery demands.²⁰⁴ Nevertheless, the fact that the Advisory Committee has not proposed any rulemaking in response to *Twombly* suggests that it does not view the Court in *Twombly* as having usurped the rulemaking function, rendering criticism of *Twombly* on that basis moot.

C. Opting Out of the Court System

A third response to the perceived problems with inadequacies of the Federal Rules has been for litigants to flee the federal court system in favor of (1) forums outside the United States and (2) arbitration and other alternative dispute resolution (ADR) mechanisms.²⁰⁵

1. Flight to Foreign Forums

In our increasingly globalized economy, more and more foreign firms and individuals find themselves subject to the jurisdiction of United States law, which differs both substantively and procedurally from the laws of their home nations. Private rights of action, mandatory treble damages, class actions, pretrial discovery, and jury trials—common features of the American system—are unknown in many foreign jurisdictions. The jury system is particularly

²⁰² See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 621, 648, 656 (2010) (criticizing the Supreme Court’s disregard for the rulemaking process).

²⁰³ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986).

²⁰⁴ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

²⁰⁵ See, e.g., *Glamis Gold, Ltd. v. United States*, NAFTA Arb. Trib., Decision on Parties’ Requests for Production of Documents Withheld on Grounds of Privilege ¶ 20 n.1 (Nov. 17, 2005) (“[T]he Tribunal recognize[d] that it is generally understood that one reason parties choose arbitration is to avoid the relatively expensive document production practices of courts generally and United States courts in particular.”).

dumbfounding for those who come from civil law regimes. The notion of having a legal dispute resolved by six persons—chosen by lot, unaffiliated with any of the parties, who know nothing about the facts (other than what they hear in court), and nothing about the law (other than what the judge tells them)—is troubling and very risky.

Not surprisingly, foreign firms seek to minimize these and other perceived risks by avoiding American courts and American law through forum selection and choice of law clauses.²⁰⁶ The courts have generally upheld these clauses.²⁰⁷

2. Alternative Dispute Resolution

ADR procedures—including arbitration, mediation, neutral evaluation, mini-trials, and summary jury trials—have thrived in the last three decades in large part because they have been viewed as faster and more economical than the courts for resolving disputes.²⁰⁸ These mechanisms typically permit the parties to control the amount and cost of discovery, the length of any hearing, the number of witnesses to testify, and even the identity of the finder(s) of fact.²⁰⁹ ADR is also private, and thus it allows parties to preserve business relationships, permits them to adopt innovative remedial techniques, and shields any dispute from public scrutiny.²¹⁰ Additionally, ADR

²⁰⁶ See Jeffery B. Struckhoff, *The Irony of Uberrimae Fidei: Bad Faith Practices in Marine Insurance*, 29 TUL. MAR. L.J. 287, 303–08 (2005); see also Asa Markel, *American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?*, 21 PACE INT'L L. REV. 163, 174 (2009) (noting that international commercial entities go to great lengths to avoid American courts); see also Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1133–35 (1996) (“foreigners are reluctant to litigate in America for a variety of reasons”).

²⁰⁷ See *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 579–80 (2013) (enforcing forum selection clause); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (Forum selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”).

²⁰⁸ See Virginia Knapp Dorell, *Picturing a Remedy for Small Claims of Copyright Infringement*, 65 ADMIN. L. REV. 449, 461 (2013) (“An ADR process shares some of the benefits of an administrative proceeding, including lower costs, faster resolution of cases and an easing of the federal courts’ workload.”).

²⁰⁹ See David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 88 (2013); Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 759, 773–74 (2012).

²¹⁰ Cleveland, *supra* note 209, at 88; Wolf, *supra* note 209, at 773–74; see Kristin L. Fortin, *Reviving the Lawyer’s Role as Servant Leader: The Professional Paradigm and a*

arrangements can limit damage exposure and effectively insulate parties from substantive liability. Consequently, the Supreme Court has upheld arbitration provisions banning class actions.²¹¹ That, in turn, would effectively immunize the defendant from antitrust claims when the damages per individual plaintiff are nominal, even if the damages in the aggregate are substantial. Finally, ADR mechanisms offer hope for civility in resolving disputes which many parties prefer over the contentiousness that characterizes much of today's litigation.²¹²

The principal downside of ADR for users is that the right to appeal most decisions rendered in ADR proceedings is "severely restricted."²¹³ There are also significant public interest concerns, including lack of public scrutiny, due process protections, systematic reporting, stare decisis, and procedure protections—including limitations on the rules of discovery and rules of evidence.²¹⁴

3. Court-Annexed ADR

The popularity and success of ADR have not gone unnoticed by the courts. Many courts have embraced ADR and brought it into the judicial system through various court-annexed ADR programs.²¹⁵ Oftentimes, these programs involve certain classes of cases that are referred in the first instance to a court-appointed mediator who meets with the parties and proposes a resolution.²¹⁶ The mediator's proposal

Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution, 22 GEO. J. LEGAL ETHICS 589, 618 (2009).

ADR ensures the most cost-effective, timely, and conciliatory resolution of disputes and produces: heightened public satisfaction with the justice system; creative resolutions where parties have more autonomy and control over the outcome; voluntary compliance with agreements; speedy and generally amicable settlement of disputes; community connectedness by restoring the influence of neighborhood and community values and reducing social friction; an accessible forum for all disputants, including previously unrepresented individuals; a reduction in court congestion and costs; and an example of how to effectively resolve disputes without resorting to violence or adversarial proceedings.

Id.

²¹¹ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011).

²¹² See Fortin, *supra* note 210, at 618.

²¹³ Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 37, 49–50 n.32 (1996).

²¹⁴ See George A. Martinez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799, 827–28 (2010).

²¹⁵ See, e.g., U.S. DIST. COURT, E. DIST. OF N.Y., DISPUTE RESOLUTION PROCEDURES, available at <https://img.nyed.uscourts.gov/files/forms/DisputeResolutionProcedures.pdf>.

²¹⁶ *Id.*

is not binding on the parties, and they are free to reject it and go forward with the litigation.²¹⁷ Not all such mediations are successful, but many are and thereby free up judicial resources for other cases.

4. Settlement

Lawsuits are typically brought because parties to a dispute cannot resolve their differences. But, even after the litigation has commenced, parties may choose to settle the matter among themselves rather than have the matter proceed to judicial resolution. Indeed, the lawsuit itself may be the impetus for serious discussions among the parties to resolve their dispute. Generally, settlements are encouraged. Parties often prefer to have a say in the final outcome rather than have that outcome imposed on them.

On the other hand, there are situations in which settlement does not produce a desirable outcome. For example, when a defendant faces a claim that is thin on the facts but very expensive to defend, he or she may choose to settle rather than to seek exoneration through a trial, because settlement is the more cost-effective alternative. Settlements under these circumstances bear little relationship to the merits of the claims and defenses, and defendants understandably feel coerced.²¹⁸ Also, when defendants settle cases in order to prevent public disclosure of wrongdoing—such as the manufacture and sale of defective products—and then insist on keeping the details of the settlement confidential, settlement does not serve the interests of the public at large.

III

FEDERAL CIVIL JUSTICE SYSTEM AT THE CROSSROADS

The events of the last three decades clearly demonstrate that the federal civil justice system is now at a crossroads. Courts and litigants seem to have lost sight of the overarching goal of the Federal Rules of Civil Procedure—that meritorious litigants should have their day in court. Concern about high costs of litigation have trumped concern that meritorious claims go to trial. By granting summary judgment or motions to dismiss pursuant to Rule 12(b)(6), and by denying class action certification, the courts are adjudicating matters on truncated

²¹⁷ *Id.*

²¹⁸ See Handler, *The Shift*, *supra* note 52, at 9–12.

records at points earlier and earlier on the litigation timeline.²¹⁹ This approach surely saves discovery costs, but we should query whether it gives the plaintiff a fair shot at airing his or her claims.

As discussed above, cost concerns have also led litigants to select foreign forums or to opt for ADR solutions.²²⁰ This flight from the court system, combined with the trend to decide cases at points much earlier on the litigation timeline, has created the phenomenon of the vanishing civil trial.²²¹ Although the flight from the court system may have short-term benefits for those involved in legal disputes, in the long run, it serves neither the private interest of litigants nor the public interest.

A. The Importance of Providing and Supporting a Robust Public Court System

Courts have traditionally played a key role in resolving disputes among citizens. First, the court system helps to establish behavioral norms so that people can live together in harmony.²²² Second, the courts provide a public forum in which litigants can assert and resolve grievances.²²³ Third, the courts are a valuable source of information for the public.²²⁴ It is imperative that these functions be preserved.

1. Establishing Behavioral Norms

A key function of the law is to create and enforce behavioral norms. As Judge Weinstein has observed, “[f]or law to serve its function as giving expression to enforceable behavioral norms, it must be made publicly for all to see.”²²⁵ Court decisions are available to all; they not only inform the public of what the law is but also enable people to predict outcomes and adjust their conduct accordingly.²²⁶

²¹⁹ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 116–19 (noting the trend to move case dispositions to points even earlier on the litigation timeline through summary judgment, motions to dismiss, *Daubert* motions, and class certification).

²²⁰ See *supra* Part II.C.

²²¹ See Higginbotham, *supra* note 5, at 747.

²²² See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 248–49 (1996) [hereinafter Weinstein, *Benefits and Risks*].

²²³ *Id.* at 251.

²²⁴ See *id.* at 248–51.

²²⁵ *Id.* at 249.

²²⁶ *Id.*

2. Public Forum to Resolve Disputes

The court system provides a public forum, accessible to all, for the resolution of disputes among citizens through litigation. Although some observers have criticized the United States as a litigious society,²²⁷ litigation itself is not bad. Rather, litigation is an important tool in the civil justice system. Indeed, the courts exist to bring about the “just, speedy, and inexpensive” resolution of claims.²²⁸ Litigation plays a crucial role in preserving and extending the rule of law.

a. The Public Interest Is Served Through Litigation

The court system provides more than just a public forum for resolving disputes. Courts, through litigation, construe statutes and common law precedents through principled decisions. Judicial decisions are subject to public scrutiny and protest.²²⁹ Parties to a case may appeal adverse results. Through the appellate process, legal issues are carefully and thoughtfully analyzed and resolved. Decisions of the United States Supreme Court become the law of the land. Under stare decisis, common law assures that like cases are treated alike.

The Constitution confers adjudicatory powers on the judiciary. However, as the Supreme Court observed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court “cannot buy support for its decisions . . . and, except to a minor degree, it cannot independently coerce obedience to its decrees.”²³⁰ Rather, the Court noted, its “power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”²³¹ Legitimacy requires more than justifying a judicial act by reference to legal principle; “the Court’s legitimacy depends on making legally principled decisions under circumstances

²²⁷ See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3–5 (1986). But see Weinstein, *After Fifty Years*, *supra* note 20, at 1907–09 (“Concern over excessive litigation in the federal courts is old hat . . . [and] also typically exaggeration. . . . The truth about the ‘litigation explosion’ is that it is a weapon of perception, not substance. If the public can be persuaded that there is a litigation crisis, it may support efforts to cut back on litigation access.”).

²²⁸ See FED. R. CIV. P. 1.

²²⁹ See Weinstein, *Benefits and Risks*, *supra* note 222, at 250–51.

²³⁰ 505 U.S. 833, 865 (1992).

²³¹ *Id.*

in which their principled character is sufficiently plausible to be accepted by the Nation.”²³²

That the Court’s decision be viewed as legitimate is especially important when fundamental rights are at stake. For example, decisions by the Supreme Court on civil rights issues—such as, the right to vote or the right to be free from racial discrimination—inure for the benefit of the entire populace and not just the parties before the court.

Although access to public courts is important, the right of access is not without limitations. The doctrines of claim preclusion and issue preclusion, closely related to the concept of stare decisis, bar a party from relitigating claims and from relitigating issues that have previously been litigated and decided by the courts. These concepts thereby promote not only consistency of results but also provide peace and efficiency to the litigants and the courts.²³³

b. Development of the Law

Litigation plays a key role in the development of the law. First, litigation is a vehicle for overruling bad precedents. The rulings in some cases are simply wrong and should be overruled. For example, the “separate but equal” doctrine enunciated in *Plessy v. Ferguson*,²³⁴ which licensed state-sanctioned racial segregation, was morally offensive and contrary to the Constitution. *Plessy*, of course, was eventually overruled by *Brown v. Board of Education*.²³⁵ As a result of *Brown*, state-authorized racial segregation was illegal throughout the United States.²³⁶ Imagine if *Brown* had been decided by an arbitrator instead of the courts. Any arbitrator’s decision would not have been the law of the land but rather would have bound only those who had been parties to the proceedings. Litigation brought about a major change in the law that an arbitrator would have been powerless to implement.

Other cases, although perhaps not morally offensive like *Plessy*, are nevertheless wrongly decided and also should be overruled. These cases attract criticism from commentators and the courts, calling for

²³² *Id.* at 866.

²³³ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 27 (1982). Claim preclusion is sometimes referred to as the rule of merger. *Id.* § 23.

²³⁴ 163 U.S. 537 (1896).

²³⁵ 347 U.S. 483, 494–95 (1954).

²³⁶ See *id.* at 495–96.

the precedent to be reexamined. The *Erie*²³⁷ line of cases is an apt example. This line of cases begins with the 1840 decision of *Swift v. Tyson*, in which the Supreme Court held that a federal court sitting in diversity is free to ignore a state's common law and apply instead federal general common law.²³⁸ Over the next century, it became clear that *Swift* had (1) failed to produce the hoped-for uniform law governing commercial practices, (2) gave rise to the unsavory forum-shopping tactics, (3) produced blatantly unfair results, and (4) probably misconstrued the Rules of Decisions Act ab initio.²³⁹ In its lifetime, *Swift* had been the target of withering judicial and academic criticism.²⁴⁰

In 1938, the Supreme Court in *Erie* overruled *Swift*, concluding that *Swift* was “an unconstitutional assumption of powers by courts of the United States.”²⁴¹ Diversity jurisdiction may offer litigants a federal forum, but it does not entitle them to results that would be substantially different from the results in state court.²⁴² After *Erie*, the rule of decision in diversity cases was provided by state law, whether statutory or court-made, thereby minimizing the true evils of forum-shopping and inequitable administration of the law.

Similarly, in the area of prior judgments, litigation has been the vehicle to eliminate bad precedents. It is a fundamental rule of res judicata that a person who is not a party to a judgment cannot be bound by that judgment.²⁴³ But may a person who is not a party to a judgment *benefit* from that judgment? Initially, the courts answered that question in the negative and developed the rule of mutuality of estoppel: one not bound by a judgment cannot benefit from that judgment.²⁴⁴ The rule of mutuality “provided a party who had

²³⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²³⁸ 41 U.S. 1, 18 (1842).

²³⁹ *Erie*, 304 U.S. at 74–79.

²⁴⁰ *Id.* at 74 nn.7–8.

²⁴¹ *Id.* at 79.

²⁴² *See id.*

²⁴³ *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008); *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) (“[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.’ . . . This rule is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’” (citations omitted)).

²⁴⁴ *See Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) (“It is a principle of general elementary law that the estoppel of a judgment must be mutual.”).

litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.”²⁴⁵ The rule of mutuality, which is rooted in fairness,²⁴⁶ often ran counter to basic rules of preclusion, which are rooted in finality, efficiency, and consistency.²⁴⁷ Too often, the rule of mutuality simply permitted the defendant to get a second bite of the apple and relitigate a case that it already lost once before. The courts first created fact-specific exceptions to the rule of mutuality.²⁴⁸ Eventually, however, it became clear that the rule limited the application of collateral estoppel principles without significant concomitant benefit.²⁴⁹ As long as a defendant had his or her day in court, i.e., a full and fair opportunity to litigate the case, the defendant was foreclosed from relitigating issues that had been raised, litigated, and adjudicated in prior actions.²⁵⁰

Finally, litigation played a key role in the evolution of the law of vertical restraints in antitrust law. In *United States v. Arnold, Schwinn & Co.*, the Supreme Court held that when a manufacturer departed with “title, dominion, and risk” with respect to a good that it had sold, any effort by the manufacturer to control where and to whom a reseller could dispose of the product was unlawful on its face under section one of the Sherman Act.²⁵¹ *Schwinn* generated confusion in the marketplace and was the subject of significant academic criticism.²⁵² A decade later, the Supreme Court reversed *Schwinn* in the landmark *Sylvania* case and held that vertically imposed territorial restraints are unlawful only when the plaintiff can prove demonstrable

²⁴⁵ *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 (1979).

²⁴⁶ *See id.*

²⁴⁷ *See* Allan D. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1723 (1968).

²⁴⁸ *See, e.g.,* *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349–50 (1971) (determining that a defendant in a patent infringement litigation may plead issue preclusion when the patent had been held invalid in a prior case against another defendant); *Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 122 P.2d 892, 895–96 (Cal. 1942) (holding that the rule of mutuality does not apply in cases of imputed liability when a plaintiff unsuccessfully sues the alleged active tortfeasor and then seeks to sue the alleged passive wrongdoer). “No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as *res judicata* against a party who was bound by it is difficult to comprehend.” *Id.* at 895.

²⁴⁹ *See Parklane Hosiery*, 439 U.S. at 331–32.

²⁵⁰ *Id.* at 332–33.

²⁵¹ 388 U.S. 365, 381–82 (1967).

²⁵² *See Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48 n.13 (1977).

anticompetitive effects.²⁵³ Rarely is that the case, and today, non-price vertical restraints are virtually per se lawful.

Sylvania led to a rethinking of vertically imposed price restraints—resale price maintenance (“r/p/m”). In its 1911 *Dr. Miles* decision, the Supreme Court ruled that r/p/m was per se illegal.²⁵⁴ Critics of *Dr. Miles* argued that, in the wake of *Sylvania*, per se condemnation of r/p/m was no longer viable.²⁵⁵ Critics also argued that r/p/m, as in the case of non-price vertical restraints, may offer significant pro-competitive benefits, including promotion of inter-brand competition, introduction of services to the buyer, elimination of free riding and promotion of new products.²⁵⁶ Accordingly, r/p/m ought not to be condemned out of hand.

The Supreme Court first addressed maximum r/p/m in *State Oil Co. v. Khan*, ruling that maximum r/p/m generally resulted in low prices to consumers and consequently ought not to be summarily condemned.²⁵⁷ The Court in *Khan*, however, left for another day the issue of minimum r/p/m and thus did not disturb *Dr. Miles*.²⁵⁸ Nevertheless, when the Court did revisit *Dr. Miles* in *Leegin v. PSKS, Inc.*, it overruled *Dr. Miles*—relying heavily on the principles set forth in both *Sylvania* and *Khan*—holding that r/p/m should be condemned only when anticompetitive effects outweigh any pro-competitive benefits.²⁵⁹

c. Certainty and Predictability in the Law

Litigation also promotes certainty and predictability in the law. The r/p/m line of cases also illustrates this point. Soon after *Dr. Miles*, courts authorized ways around the per se rule. For example, in *United States v. Colgate & Co.*, the Court held that a manufacturer could unilaterally announce in advance its terms of sale, including a “suggested” resale price.²⁶⁰ As long as the retailer did not “agree” to those terms, the conduct would be outside the scope of the first

²⁵³ *Id.* at 59.

²⁵⁴ See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407–09 (1911).

²⁵⁵ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 288–91 (1978).

²⁵⁶ *Id.*

²⁵⁷ 522 U.S. 3, 22 (1997).

²⁵⁸ *Id.* (making clear that *Khan* addresses only maximum price fixing).

²⁵⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899–901, 907 (2007).

²⁶⁰ 250 U.S. 300, 306–07 (1919).

section of the Sherman Act.²⁶¹ On the one hand, if the retailer sold at a price other than the suggested resale price, it could be lawfully terminated under *Colgate*. In addition, courts held that when the manufacturer retained legal ownership of the goods and distributed them through an agency model, *Dr. Miles* did not apply.²⁶²

Colgate and its progeny created significant uncertainties in distribution law as to (1) what constituted an agreement to fix resale prices; (2) whether the termination of a discounting retailer was the unilateral act of the manufacturer or done in concert with, and at the behest of, complaining rivals of the discounter; (3) precisely what steps a manufacturer could take in enforcing its “unilateral” terms of sale; and (4) whether the manufacturer’s distribution system was a true agency relationship or a disguised sales system dressed up as an agency model. The answer to these questions created a patchwork quilt of confusing and often inconsistent precedents.²⁶³

Leegin eliminated the uncertainties that arose in the aftermath of *Colgate*. All vertical restraints would be adjudged under the rule of reason.²⁶⁴ No longer would courts engage in technical hairsplitting as to whether (1) conduct is unilateral or conspiratorial, (2) the distribution system is a true agency system, or (3) the resale price is suggested or mandatory. The question post-*Leegin* is whether the anticompetitive effects of the conduct outweigh the pro-competitive benefits.²⁶⁵

Certainty and predictability clearly benefit buyers and sellers participating in a given marketplace who can now predict the consequences of their actions with some certainty. Clear rules also make law accessible to litigants seeking to bring private enforcement actions, and it facilitates private rights of action. Moreover, as rules become clearer and more predictable, the need for litigation in the long run is diminished.

²⁶¹ See *id.*

²⁶² *United States v. Gen. Elec. Co.*, 272 U.S. 476, 486–88, 490 (1926).

²⁶³ See *Leegin*, 551 U.S. at 902–04 (pointing out the confusion that has arisen in the wake of *Dr. Miles* and concluding that “it is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—by requiring manufacturers to choose second-best options to achieve sound business objectives”).

²⁶⁴ *Id.* at 882.

²⁶⁵ See *id.* at 882, 892.

3. Public Courts Provide Information

The court system also functions as an important source of information which may bear on public safety and welfare.²⁶⁶ For example, lawsuits can call public attention to life-threatening defects in the design or manufacture of automobiles or to heretofore undisclosed side effects of certain prescription medicines. Were people left solely to private means of dispute resolution, these problems might never come to light and continue to menace society.

B. The Downsides of ADR

First, ADR is one-dimensional in the sense that it is geared solely toward dispute resolution; ADR panels are accountable only to the (paying) parties before them. ADR may effectively resolve the private dispute before the panel, but that which serves private interests does not necessarily serve the public interest as well. In litigation, the courts monitor the public interest; no one fills that role in ADR.²⁶⁷

Second, unlike court decisions, ADR decisions are not subject to public scrutiny. For example, ADR decisions are not systematically reported. ADR panels are not required to issue reasoned decisions, nor are they bound by prior decisions, whether by courts or other ADR panels. Principles of stare decisis do not apply to ADR. ADR rulings are not appealable within the court system. Accordingly, the “law” that evolves through ADR is not accessible to the public; and there is no systemic mechanism for the law to evolve in the ADR realm. Rather, ADR may serve to freeze the law at a given point in time.

Third, ADR may be used as an instrument of oppression when parties to a dispute lack equal bargaining power. It is one thing to agree to ADR as part of an arm’s length negotiation. It is quite another for a dominant seller to impose ADR upon an unwary consumer or customer. For example, in the securities industry, brokers use contracts of adhesion with ADR provisions to steer disputes clear of the courts.²⁶⁸ This tactical use of ADR to forum-shop and avoid unfavorable judicial precedent is not what ADR proponents had in mind in trumpeting the benefits of ADR.

²⁶⁶ Weinstein, *Benefits and Risks*, *supra* note 222, at 251.

²⁶⁷ *Id.* at 260, 262–63.

²⁶⁸ *Id.* at 260–61.

Fourth, this tactical use of ADR calls into question the fairness of the process.²⁶⁹ In the courts, judges are randomly assigned to cases and must disqualify themselves if they have bias or any financial interest in the case. In ADR cases, particularly securities cases, panel members are often drawn from the ranks of industry management and may bring with them a pro-industry bias.²⁷⁰

More fundamentally, as the wealthy flee the courts system, a two-tiered system of justice is taking shape: a private system of ADR for the wealthy, and a public court system that is left to handle criminal cases and disputes among the poor.²⁷¹ This flight from the courts threatens to reduce the power of the courts over society generally.²⁷²

Fifth, ADR has generally been touted as cheaper than litigating in the courts. That is not necessarily so today. Arbitrations, in particular, mimic full-blown judicial trials, with extensive pre-hearing discovery.²⁷³ In ADR, parties may incur significant upfront fees for the panels and administrative expenses.²⁷⁴ This is, of course, not the case in the court system in which judges are compensated through tax dollars, and litigants pay flat filing fees to cover administrative costs. Nor does ADR necessarily reduce attorneys fees, since attorneys must be paid whether in court or in ADR.

Equally important, the Federal Rules of Civil Procedure have detailed standards for moving cases along from complaint to resolution. ADR cases, on the other hand, move at a pace dictated by the panels; proceedings could be drawn out for years.²⁷⁵ Rather than have the Federal Rules of Civil Procedure to govern proceedings, ADR subjects parties to the panel's make-it-up-as-you-go protocol.

IV

GETTING BACK ON TRACK IN THE POST-*TWOMBLY* WORLD

The federal courts have a unique opportunity to reclaim litigants who have migrated to ADR over the last three decades. To do so, the courts must adjust to the realities of twenty-first century litigation with a three-pronged strategy. First, the courts must embrace the

²⁶⁹ See *id.* at 261.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 262 (internal quotation marks omitted).

²⁷² *Id.* at 261–62.

²⁷³ See Ileana Blanco & Tanya C. Edwards, *Arbitration v. Litigation Pros and Cons: What Business Lawyers Need to Know*, 69 TEX. B. J. 858, 859 (2006).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

proportionality standards for pleading suggested in *Twombly*, which means that the amount of factual detail required for a pleading to survive a motion to dismiss varies depending on the complexity of the case. Second, the courts must impose appropriate limitations on discovery as authorized by the Federal Rules. Third, the courts must set, and adhere to, deadlines for the completion of discovery and the commencement of trial.

A. Harmonizing the Ideals of the Federal Rules with Realities of Litigation

1. Proportionality

The plausibility standard enunciated in *Twombly* and reaffirmed in *Iqbal* is fluid, not fixed.²⁷⁶ In a nutshell, *Twombly* and *Iqbal* held that the level of factual content in the complaint is directly proportional to the complexity of the case and the likely discovery costs.²⁷⁷ Thus, when a plaintiff alleges a complex antitrust conspiracy, threadbare allegations of agreement coupled with stray assertions of consciously parallel behavior simply will not pass muster under *Twombly*.²⁷⁸ On the other hand, in a run-of-the-mill negligence claim arising from an automobile accident, detailed factual allegations are unnecessary.²⁷⁹

The Court in *Twombly* and *Iqbal* was also concerned with the high costs of false positives. In *Twombly*, the Court declined to condemn conduct “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market” as it would have with unlawful conspiracy.²⁸⁰ Condemning conduct that could be just as consistent with “competition” as it would be with “conspiracy” would tend to chill beneficial pro-competitive behavior.²⁸¹ On the other hand, when the conduct is more egregious and less defensible, the enhanced pleading standards of *Twombly* and *Iqbal* “[are] not justified.”²⁸²

²⁷⁶ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 134–35.

²⁷⁷ See *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (“[T]he height of the pleading requirement is relative to circumstances.”).

²⁷⁸ See *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010).

²⁷⁹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

²⁸⁰ *Id.* at 554.

²⁸¹ *Id.*

²⁸² Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y 1, 66 (2010).

Context, good judgment, and common sense—not any quick fact/conclusion bucketing—should guide the court’s decision on the sufficiency of a complaint challenged on a motion to dismiss. This is nothing new. As the court in *Austen v. Catterton Partners V, LP* observed, “[c]ontext, good judgment and common sense mattered long before the Supreme Court decided *Twombly* and *Iqbal*.”²⁸³ The court in *Austen* offered the following example as to how *Twombly* and *Iqbal* should be sensibly applied in passing on the sufficiency of a complaint without jumping into the thorny fact/conclusion thicket.

If a plaintiff says that a defendant intended to, and did, punch the plaintiff in the nose, is that a statement of fact about the defendant’s act and intent, or is it a conclusion since none of us is a mind reader? In most circumstances, the Court would consider that statement to be one of fact that the Court would be required to assume is true for purposes of a Rule 12(b)(6) motion. On the other hand, if a plaintiff baldly asserts that she was subjected to a “hostile work environment” without more, the Court would consider that statement be a mere conclusion—in the parlance of the Supreme Court, a “threadbare recital”—to which the Court need not defer. In the latter example, further facts would be needed (and in this example, the plaintiff certainly would know what environment she had been subjected to) in order to provide adequate notice to the defendant of the basis for the lawsuit and to make the plaintiff’s hostile work environment claim plausible.²⁸⁴

2. *Special Cases*

Certain factual situations call for the courts to be circumspect in applying *Twombly*. For example, the Supreme Court has made clear that *Twombly* does not change the longstanding policy of giving pro se plaintiffs wide latitude in pleading.²⁸⁵ Courts should be circumspect in dismissing complaints when evidence of wrongdoing is in the hands of the defendant exclusively.²⁸⁶ Under those circumstances, the plaintiff cannot prove its case without access to defendant’s files but, at the same time, cannot get discovery without first suing. In such cases, the better approach would be for the court to

²⁸³ *Austen v. Catterton Partners V, LP*, 709 F. Supp. 2d 168, 172 (D. Conn. 2010).

²⁸⁴ *Id.* at 171–72.

²⁸⁵ See *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007).

²⁸⁶ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 137; see, e.g., *Bausch v. Stryker Corp.*, 630 F.3d 546, 558 (7th Cir. 2010) (finding an error to dismiss with prejudice where relevant information was confidential under federal law).

give plaintiff the opportunity to conduct limited and specifically targeted discovery before considering a motion to dismiss the complaint.²⁸⁷ The amount of discovery allowed in such cases would be governed by the proportionality principles embedded in Rule 26(b)(3) and the sound discretion of the court.²⁸⁸

In addition, in private damage actions that follow successful government prosecutions of the defendant(s), motions to dismiss on *Twombly* grounds should be granted only in the most unusual cases. The success of the prior government prosecutions should allay any concern that the private action is “largely groundless.”²⁸⁹ In these cases, a poorly drafted complaint is best addressed by a remedy other than dismissal. In short, there is a presumption of merit in private actions that are follow-ons to successful government enforcement actions. This presumption of merit would apply, however, when defendants are merely subject to a government investigation, and no action has been filed.

3. Dismissal Without Prejudice

As a general matter, courts can ease the harshness of *Twombly* by dismissing defective complaints without prejudice.²⁹⁰ If the plaintiff fails to address the deficiencies in its complaint after they have been identified by the courts, dismissal with prejudice is appropriate. Of course, in those cases when no amount of factual allegations can cure the defects in the complaint, the trial court may dismiss with prejudice in the first instance.

B. Embrace the Federal Rules on Discovery

As discussed above, the driving force behind the *Twombly* holding was the Court’s concern about the high cost of discovery and the fact that the threat of high discovery costs can be used to coerce settlements that may not be justified by the merits of a claim. The high cost of discovery has been, and continues to be, a major issue in federal civil litigation. At the same time, the Court’s cavalier

²⁸⁷ See Cavanagh, *Making Sense of Twombly*, *supra* note 8, at 137.

²⁸⁸ FED. R. CIV. P. 26(b)(3).

²⁸⁹ Cf. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citations omitted).

²⁹⁰ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 781 F. Supp. 2d. 955, 959 (N.D. Cal. 2011) (“The Ninth Circuit has ‘repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’” (citation omitted)).

dismissiveness of the discovery scheme under the Federal Rules is troublesome. The Court simply throws up its hands and says that discovery is controlled by the parties, not the court. That is simply not the case. The 1983 Amendments and the 1993 Amendments to the Federal Rules vest the trial court with broad powers to control discovery. The trial court must approve a discovery plan before the process can begin.²⁹¹ As part of the planning process, the court can impose numerical limits on the number of interrogatories,²⁹² the number of depositions,²⁹³ and the court can limit the length of any deposition.²⁹⁴ Courts *can* control discovery and its costs.

The Court's dismissiveness is also troubling from a process perspective. The Federal Rules of Civil Procedure govern procedure and practice in federal courts. Trial courts are not free to disregard rules that they believe are ineffective. If a rule does not work, it should be changed through the established rulemaking process, not simply ignored by the courts on an ad hoc basis. The willingness of the Court in *Twombly* to ignore the Federal Rules raises issues of fairness as well as the appearance of fairness.

Thus, the problems of discovery costs are not for want of having tools to control those costs, but rather for lack of will of judges to utilize those tools. The rules cannot work if they are not utilized. To paraphrase John Lennon, "[a]ll we are saying is give [the rules] a chance."²⁹⁵ Active case management has long been recognized as an effective vehicle for reducing costs and delay. This is not to suggest that every case needs to be micromanaged. Nor is it necessary for the *judge* to actively oversee discovery. A judge may elect to delegate that task to a magistrate judge. The hallmark of the discovery rules is their flexibility. The court can choose those cases that would benefit from close oversight during the pretrial phase and decide in any given case whether the judge or a magistrate judge is the appropriate case manager. Discovery *is* manageable, and the surgical approach embodied in the Federal Rules is preferable to the nuclear option embraced by *Twombly*.

²⁹¹ FED. R. CIV. P. 26(f).

²⁹² FED. R. CIV. P. 33(a).

²⁹³ FED. R. CIV. P. 30(d)(2).

²⁹⁴ *Id.*

²⁹⁵ PLASTIC ONO BAND, *Give Peace a Chance* (Apple Records 1969).

C. Restore Confidence in the Federal Courts

For the last forty years, the federal courts have been under siege from (1) defendants, who view the federal court system as too expensive and time-consuming; (2) plaintiffs, who view the courts as too eager to resolve cases short of trial; and (3) Congress, which views the federal courts as too costly and unwieldy to effectively serve the people. Whether public perceptions are accurate or not is largely irrelevant because they have led to tangible consequences. Defendants have fled federal courts in favor of ADR or foreign forums. Plaintiffs have sought refuge in state courts. Congress enacted the Civil Justice Reform Act of 1990 in an attempt to make federal courts both accessible and cost-effective.

As discussed above, the ADR movement has had many benefits for its participants, but it also has had some undesirable spillover effects. First, it is now clear that ADR is not always voluntary and has been used by large institutions to keep consumers out of the courts. Second, ADR decisions do not create transparent precedent that is known to all and enforceable in the courts. Rather, ADR creates opaque precedents—that are known to arbitrators and participants in ADR and not generally binding nor subject to judicial review.

It is crucial that we maintain a federal court system that is accessible to all, that levels the playing field among litigants, that offers juries as fact finders to bring the wisdom of the community to bear on the resolution of a dispute, and that creates precedent that is known to all and binding on all. Federal courts are public institutions created by law and ultimately accountable to the public. The courts are empowered to construe the law, to develop legal precedents accessible to the public, and to make authoritative pronouncements binding on the public. The federal courts, however, do more than simply resolve disputes among parties. Federal courts provide mechanisms, such as contempt, to assure that their decisions are respected by the parties. Rulings of the courts can be tested by the appellate process, and erroneous decisions can be corrected. Outdated precedents can be cast aside in favor of rulings that reflect modern realities.

None of this can be accomplished through ADR mechanisms or settlement agreements. As Professor Owen Fiss observed:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the

legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasions, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be “forced” to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal.²⁹⁶

Upon sober reflection, two propositions are clear: (1) the federal court, although not above reproach, has gotten a bad rap; and (2) ADR is not a panacea for the perceived ills of the courts. But, how does the court system reclaim those litigants who have fled? The answer is not easy. Or, is it? The CJRA was a far-reaching reform proposal that required each of the ninety-four district courts to study the reason for unnecessary cost and delay in its particular district, and then to propose a plan to address the specific problems identified. The CJRA, however, did little to affect the perceived problems of excessive cost and delay. Rather, it created more confusion than clarity by adding yet another layer of local rules to the court system. Evaluating the CJRA in 1997, the RAND Corporation acknowledged that the CJRA had failed to achieve its goals.²⁹⁷

After millions of dollars had been poured into the CJRA, RAND, in its evaluation, concluded that the most effective tools to limit excessive costs and delay were through the courts establishing and

²⁹⁶ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984).

²⁹⁷ See THE RAND REPORT, *supra* note 71, at 1–3.

adhering to early and strict deadlines for the completion of discovery and setting firm trial dates. Perhaps the way forward for federal courts is simple: adhere to the Federal Rules; set and enforce early, firm discovery deadlines; manage discovery when necessary; and permit meritorious cases to proceed to trial. At the same time, the courts should avail themselves of technological advances that make litigation more efficient and the court system more user-friendly.

CONCLUSION

It is imperative that we maintain a vibrant federal civil justice system, not only to resolve disputes among litigants but also to maintain confidence in the rule of law. The court system must reclaim the lost generation of litigants who have taken flight and become, in Judge Weinstein's words, "the beacon to which those with serious substantive grievances could turn for direction toward justice."²⁹⁸

²⁹⁸ See Weinstein, *After Fifty Years*, *supra* note 20, at 1906.

